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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 DAVID PAZ, an individual and on
14 behalf of all others similarly
15 situated,

16 Plaintiff,

17 vs.

18 PLAYTEX PRODUCTS, INC., a
19 Delaware Corporation, and Does 1
20 through 100, inclusive

21 Defendants.

CASE NO.: 07CV2133 JM (BLM)

Honorable Jeffrey T. Miller
Courtroom 16

**DEFENDANT PLAYTEX PRODUCTS,
INC.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFF'S COMPLAINT [FRCP
12(b)(6)]**

**[Filed Concurrently With Notice Of
Motion and Motion to Dismiss
Plaintiff's Complaint; Declaration Of
Brenda Liistro In Support of Motion To
Dismiss; Declaration of Ellen Darling In
Support Of Motion To Dismiss]**

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1 Defendant Playtex Products, Inc. ("Playtex") respectfully submits the
 2 following Memorandum of Points and Authorities in support of its Motion to
 3 Dismiss Plaintiff's Complaint.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **INTRODUCTION**

7 According to the Complaint, Plaintiff asserts claims against Playtex for:
 8 (1) Violation of Consumer Legal Remedies Act ("CLRA"), (2) Violation of
 9 California Business & Professions Code § 17200 ("UCL"), (3) Violation of
 10 California Business & Professions Code § 17500 ("FAL"), and (4) Violation of
 11 California Business & Professions Code § 17533.7. Plaintiff alleges in the
 12 Complaint that Playtex falsely advertised certain spill-proof cups as "Made in
 13 U.S.A." See, Complaint, page 2, ¶1. Plaintiff claims he relied on the representation
 14 and that he purchased the cups. That is *all* Plaintiff alleges about the cups and his
 15 alleged purchase of them.

16 Plaintiff's Complaint fails to state a claim against Playtex for several reasons.
 17 First, Plaintiff's Complaint is completely lacking in factual detail necessary to put
 18 Playtex on notice of the claims brought against it, as required by Fed. R. Civ.
 19 P. 8(a) and 9(b). Because Plaintiff's Complaint is undeniably "grounded in fraud,"
 20 Plaintiff must satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b).
 21 Plaintiff fails to plead any of his claims with "particularity," as required by
 22 Rule 9(b). Thus, his Complaint must be dismissed in its entirety. Additionally,
 23 Plaintiff's Complaint neither states any facts that establish any "injury in fact" nor
 24 pleads that he suffered an injury. Therefore, as pled, he does not have standing to
 25 bring a claim under the UCL, FAL, or CLRA, pursuant to section 17204 of the
 26 Business and Professions Code and section 1780 of the CLRA. Plaintiff also failed
 27 to comply with the notice requirement set forth in section 1782(a) of the California
 28 Civil Code because Plaintiff failed to send Playtex written notification of the

particular alleged violation thirty days prior to commencing an action. Plaintiff's CLRA claim further fails because Plaintiff does not comply with section 1780(c) of the California Civil Code which requires that a plaintiff bringing an action under CLRA file an affidavit concurrent with the complaint stating facts showing that the action has been commenced in a county or judicial district described in section 1780 as a proper place for the trial of the action. For all of these reasons, this Motion should be granted.

II.

FACTUAL BACKGROUND

Playtex manufactures, among other things, spill-proof cups. Playtex currently manufactures and sells 14 different types of spill-proof cups. *See* Declaration of Brenda Liistro ("Liistro Decl.") ¶2.

Plaintiff David Paz purports to represent all purchasers of spill-proof cups manufactured, distributed, marketed, advertised, and/or sold by Playtex in California with the printed label "Made in U.S.A." *See*, Complaint, page 2, ¶1. Plaintiff alleges that Playtex misrepresents the country of origin on the cups by labeling them "Made in U.S.A." *Id.* Plaintiff vaguely claims he purchased "several Playtex spill-proof cups in San Diego, California in 2007" and that the product was marked "Made in U.S.A." *See*, Complaint, page 4, ¶15. That is all that is referenced in the Complaint with respect to his purchase of these cups. The Complaint does not identify *which* of the various spill-proof cups he allegedly purchased, or where their components were allegedly manufactured. Plaintiff also does not plead that he was injured or state any facts that establish how he was injured by his purchase. In short, Plaintiff has not pled any facts that support his claims. Accordingly, this Court should grant this Motion.

III.

**THIS COURT HAS THE AUTHORITY
TO GRANT THIS MOTION TO DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)(6), a court has the authority to grant a motion to dismiss for failure to state a claim upon which relief can be granted when a plaintiff fails to plead a cognizable legal theory, or fails to allege sufficient facts to support a cognizable legal theory. *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

Here, Plaintiff's claims against Playtex are so conclusory and factually insufficient that they cannot withstand a Rule 12(b)(6) motion. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001) ("Conclusory legal allegations and unwarranted inferences are insufficient to defeat a motion to dismiss.") As discussed below, Plaintiff has not pled the requisite facts and legal elements that would entitle him to any relief against Playtex. Accordingly, Plaintiff's Complaint against Playtex should be dismissed.

IV.

LEGAL ARGUMENT

A. Plaintiff's Complaint Fails to State Facts Necessary to Put Playtex on Notice of the Claims Alleged Against It.

Federal Rule of Civil Procedure 8 requires that a complaint "contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Under the "notice pleading" standard embraced by Rule 8, a plaintiff must include "sufficient allegations to put defendants fairly on notice of the claims against them." *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

Plaintiff fails to plead facts sufficient to put Playtex fairly on notice of any of Plaintiff's claims, or to show that Plaintiff is entitled to any relief. Most notably, Plaintiff fails to state which of the various Playtex cups he allegedly purchased. This information is essential for Playtex to assess the claims alleged against it, and

1 to prepare its defense. Playtex manufactures and sells 14 types of spill-proof cups.
 2 *See*, Liistro Decl. ¶2. To the extent that Plaintiff purchased a cup that contained
 3 parts that were entirely or substantially made, manufactured, and produced in the
 4 United States,¹ all of Plaintiff's claims fail as a matter of law and his Complaint
 5 cannot be amended to cure such a defect. At a minimum, Plaintiff should be
 6 required to specify which cup or cups are at issue, which components of his cups
 7 were allegedly not made in the United States, when Plaintiff discovered this alleged
 8 fact, and how Plaintiff was injured. In short, even under the most general "notice
 9 pleading" standard, Plaintiff's Complaint is entirely lacking in factual detail
 10 necessary to support any of his causes of action against Playtex.

11 **B. Plaintiff Fails to Plead With Sufficient Particularity Under Rule 9(b).**

12 Beyond meeting the general pleading standards set forth in Fed. R. Civ.
 13 P. 8(a), Plaintiff must additionally meet the heightened standard set forth in Fed. R.
 14 Civ. P. 9(b).² In cases where fraud is not a necessary element of a claim, a plaintiff
 15 may choose nonetheless to allege in the complaint that the defendant has engaged in
 16 fraudulent conduct. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir.
 17 2003). Where the plaintiff alleges a "unified course of fraudulent conduct" and
 18 relies on that course of conduct as the basis of a claim, the complaint is said to be
 19 "grounded in fraud" or to "sound in fraud." *Id.* In such a situation, the pleading as
 20 a whole must satisfy the particularity requirement of 9(b). *Id.* at 1103, 1104.

21 ///

22 ///

23
 24 ¹ See Cal. Bus. & Prof. Code § 17533.7; *see also Colgan v. Leatherman*, 135 Cal. App. 663,
 25 668-669 (holding that merchandise has been "substantially made, manufactured, or produced
 outside the United States" where the foreign operation process, or activity employed to create
 the merchandise is found to be considerable in either amount, value or worth).

26 ² Plaintiff's claims are based in California substantive law; Rule 9(b) applies to Plaintiff's
 27 claims. *See, Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (holding "It
 28 is established law that Rule 9(b)'s particularity requirement applies to state-law causes of
 action.") *See also, Hanna v. Plummer*, 380 U.S. 460 (1965) (holding that the Federal Rules of
 Civil Procedure apply irrespective of the source of subject matter jurisdiction, and irrespective
 of whether the substantive law at issue is state or federal).

1 **1. Rule 9(b) Applies to Plaintiff's Complaint as a Whole Because**
 2 **Plaintiff's Claims Against Playtex Are Grounded in Fraud.**

3 All of Plaintiff's causes of action are based on the same general allegation—
 4 that Playtex manufactured and marketed spill-proof cups with the false
 5 representation that Playtex's spill-proof cups were "Made in U.S.A." *See*,
 6 Complaint at page 3, ¶10-11.

7 In Plaintiff's Complaint, in his "General Allegations" section, Plaintiff
 8 alleges:

9 "In addition, Defendants **fraudulently concealed the material**
 10 **facts** at issue by **failing to disclose** to the general public the
 11 country of original designation" ... "Consumers and users of
 12 these products are particularly vulnerable to these **deceptive**
 13 **and fraudulent practices**" ... "Due to Defendants' **scheme to**
 14 **defraud the market**, members of the general public were
 15 **fraudulently induced.**" *See*, Complaint, page 3-4 ¶ 12, 13, 14
 16 (emphasis added).

17 Under Plaintiff's First Cause of Action, Plaintiff alleges:

18 "Defendants' violations of the [CLRA] set forth herein were
 19 done with **awareness of the fact that the conduct alleged**
 20 **was wrongful** and were motivated solely for increased profit.
 21 It is also alleged that on information and belief that Defendants
 22 did these acts **knowing the harm that would result** to
 23 Plaintiff and that Defendants did these acts notwithstanding
 24 that knowledge." *See*, Complaint, page 7, ¶28 (emphasis
 25 added).

26 Under Plaintiff's Second Cause of Action, Plaintiff alleges:

27 "...Defendants engaged in activities that constitute **unlawful,**
 28 **unfair, and fraudulent** business practices ... by engaging in

practices that are **immoral, unethical, oppressive, or unscrupulous**...” See, Complaint, page 8, ¶¶33-34 (emphasis added).

In *Vess*, the Court acknowledged that even where a plaintiff does not use the word “fraud” anywhere in his allegations, the averments in the complaint could necessarily describe fraudulent conduct. *Vess*, 317 F.3d at 1108. Here, Plaintiff’s entire Complaint is phrased in terms of a unified course of fraudulent conduct, and in fact, Plaintiff consistently phrases his allegations using the word “fraud.” Because each of Plaintiff’s claims rests upon an allegation of fraud and contain explicit references to fraud, Plaintiff’s Complaint and the claims therein are grounded in fraud, and subject to the particularity requirements of Rule 9(b).

2. Plaintiff Fails to Comply With Rule 9(b).

Federal Rule of Civil Procedure 9(b) requires that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). Rule 9(b) ensures that fraud allegations are “specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny they have done anything wrong.” *Vess*, 317 F.3d at 1106. Rule 9(b) also serves to “... protect professionals from the harm that comes from being subject to fraud charges.” *Vess*, 317 F.3d at 1104, *quoting Anderson v. Clow (In re Stat Elecs. Sec. Litig.)*, 89 F.3d 1399, 1405 (9th Cir. 1996). Fraud allegations may damage a defendant’s reputation, and thus, Rule 9(b) “safeguards defendant’s reputation and goodwill from improvident charges of wrongdoing.” *Id.*, *quoting Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990).

In *Vess*, the Plaintiff alleged Defendants acted illegally to increase the sale of the prescription drug Ritalin in violation of CLRA, UCL, and FAL. The Court held that Plaintiff failed to meet the requirements of Rule 9(b) and, thus, dismissed Plaintiff’s Complaint where Plaintiff offered “scant specifics as to when or between

1 whom money changed hands” and failed to “identify any specific
 2 misrepresentations or specify when and where they occurred.” *Id.* at 1106, 1107.
 3 Averments of fraud must be accompanied by “the who, what, when, where, and
 4 how” of the misconduct charged. *Id.*, quoting *Cooper v. Pickett*, 137 F.3d 616, 627
 5 (9th Cir. 1997) (internal quotations omitted).

6 Similarly, in another case before the Ninth Circuit, the Court held a broad
 7 allegation that defendant changed control numbers on various tests to wrongfully
 8 represent the laboratory results did not satisfy Rule 9(b) because the plaintiff did
 9 not specify the “types of tests implicated in the alleged fraud, identify the
 10 [defendant’s] employees who performed the tests, or provide any dates, times or
 11 places the tests were conducted.” *United States v. Smithkline Beecham Clinical*
 12 *Labs*, 245 F.3d 1048, 1051 (9th Cir. 2001).

13 Another recent case provides a clear distinction between claims that satisfy
 14 Rule 9(b) and claims that do not. In *Norberg v. Trilegian Corp. a.k.a. TRL Group*,
 15 445 F. Supp. 2d. 1082 (N.D. Cal. 2006), consumers alleged they were wrongfully
 16 enrolled in one of defendants’ membership programs and that the defendant
 17 corporations wrongfully debited amounts from their credit or debit card accounts.
 18 As to plaintiffs’ CLRA claims regarding misrepresentations in advertising under
 19 1770(a)(1), (3), (5) and(9), the Court held that plaintiffs failed to allege any facts to
 20 support any harm resulting from defendants’ advertising, and that there were no
 21 allegations that plaintiff was even aware of any of defendants’ advertising. The
 22 Court held that plaintiffs failed to satisfy Rule 9(b), and granted defendants’ motion
 23 to dismiss without leave to amend.

24 In contrast, the Court in *Norberg* ruled differently as to plaintiffs’ claims
 25 under section 1770(a)(14) which prohibits representing that a transaction confers or
 26 involves rights, remedies, or obligations which it does not have or involve. As to
 27 this claim, plaintiffs alleged details as to their personal experience with defendants’
 28 representatives and the alleged misrepresentations that were made. The complaint

1 provided approximate dates (including the month and year), the manner in which
 2 Norberg discovered she was enrolled in the programs, her interactions with
 3 defendants' agents regarding the memberships and the content of defendants'
 4 alleged omissions. Thus, the Court held that plaintiffs adequately alleged both the
 5 existence of material misrepresentations and their causal relationship to the harm
 6 suffered, and thus denied defendants' motion to dismiss.

7 Here, Plaintiff fails to allege *any* details regarding his claims in this case.
 8 First, Plaintiff does not provide any information about his purported purchase of the
 9 subject cups, or about the cups themselves. Plaintiff fails to state where he
 10 purchased the cups, the approximate dates of purchase, or the manner or time in
 11 which Plaintiff discovered the alleged misrepresentation. Playtex manufactures and
 12 sells 14 types of infant spill-proof cups. *See*, Liistro Decl. ¶2. Plaintiff fails to state
 13 which two cups he purchased. To the extent that Plaintiff purchased a cup that
 14 contained parts that were entirely or substantially made, manufactured, and
 15 produced in the United States, all of Plaintiff's claims fail as a matter of law and
 16 cannot be amended. Cal. Bus. & Prof. Code § 17533.7. At a minimum, Plaintiff
 17 should be required to specify which cup or cups are at issue, where they were made
 18 and/or which components were not made in the United States, when Plaintiff
 19 discovered this alleged fact and how he was injured by it. Without this information,
 20 Plaintiff's Complaint fails to plead how Playtex has violated the UCL, FAL, or
 21 CLRA.

22 As in *Norberg*, Plaintiff fails to plead that he saw the "Made in U.S.A." label,
 23 where the label appeared, or that he would not have purchased the cups if the
 24 alleged "correct" label was on them. In fact, Plaintiff does not plead that he was
 25 injured at all by his purchase. This Court has held that where alleged
 26 misrepresentations occur in printed form, the particularity requirements of
 27 Rule 9(b) can be satisfied by "identifying or attaching representative samples of
 28 [misleading] materials." *Von Grabe v. Spring PCS*, 312 F. Supp. 2d 1285, 1306

(S.D. Cal. 2003). Not only does Plaintiff fail to attach a representative sample of the allegedly misleading materials, but he also fails to describe or provide any identifying information as to the “Made in U.S.A.” label that he allegedly saw on the cup. Moreover, Plaintiff does not allege that he was injured, or state any facts that support any alleged injury, anywhere in his Complaint.

In short, Plaintiff failed to satisfy the particularity requirements of Fed. R. Civ. P. 9(b). Rule 9(b) was enacted to protect defendants such as Playtex from vague and unsubstantiated allegations of fraud, such as these, which could irreparably damage Playtex’s reputation and goodwill absent proper application of Rule 9(b). Accordingly, Playtex’s Motion to Dismiss Plaintiff’s Complaint should be granted.

C. Plaintiff Fails to State Claims Under Business & Professions Code Sections 17200, 17500, and 17533.7.

California’s Unfair Competition Law, Cal. Bus. & Prof. Code sections 17200 et seq., and False Advertising Law, Cal. Bus. & Prof. Code sections 17500 et seq., were amended via ballot initiative in November 2004, called Proposition 64, to limit standing for a party wishing to bring a private claim under either statute to any person who has (1) suffered an “injury in fact” and (2) “lost money or property as a result of [the alleged] unfair competition.” Cal. Bus. & Prof. Code §§ 17204 and 17535. Courts have determined that the language of Proposition 64 imposes a requirement that a private plaintiff has suffered an injury and lost money or property *as a result of* relying upon defendant’s statutory violation. *See Laster v. T-Mobile USA Inc.*, 407 F.Supp.2d 1181, 1194 (S.D. Cal. 2005) (emphasis added); *see also Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 668 (1993). Plaintiff does not plead that he suffered any injury or provide facts sufficient to establish any injury in fact under either UCL or FAL, and consequently, has no standing to bring this action.

1 Plaintiff's Complaint merely alleges: (1) Plaintiff purchased two spill-proof
 2 cups in 2007; (2) the product was labeled "Made in U.S.A."; and (3) Plaintiff
 3 allegedly relied upon the "Made in U.S.A." label. However, even accepted as true,
 4 these conclusory allegations are insufficient to establish an injury in fact.
 5 Specifically, Plaintiff fails to plead, among other facts, that he actually saw the
 6 label, that he was deceived by it, or that he would have acted differently had the
 7 cups had the alleged "correct" label. In fact, Plaintiff does not plead that he was
 8 injured by his purchase anywhere in his Complaint.

9 Proposition 64 requires any private plaintiff suing under these statutes to
 10 show he suffered injury in fact and has lost money or property *as a result of* any
 11 alleged unfair competition or false advertising. Cal. Bus. & Prof. Code § 17204.
 12 The phrase "as a result of" requires that a plaintiff allege defendant's allegedly
 13 violative conduct was the cause of Plaintiff's "injury in fact." *See Laster v.*
 14 *T-Mobile USA Inc.*, 407 F.Supp.2d 1181, 1194 (S.D. Cal. 2005); *see also Caro v.*
 15 *Procter & Gamble Co.*, 18 Cal.App.4th 644, 668 (1993). Notwithstanding
 16 Plaintiff's statement in the Complaint that he relied on the "Made in U.S.A." label,
 17 Plaintiff fails to plead any facts to support this claim or to show how the label
 18 caused him injury or what injury he suffered. For example, Plaintiff fails to state
 19 which cups he purchased, when he purchased the cups, where the "Made in U.S.A."
 20 label appeared and/or whether Plaintiff saw it, or how he determined the cups were
 21 allegedly labeled improperly.

22 Plaintiff did not and cannot plead an "injury in fact" without showing how
 23 Playtex violated the UCL and FAL, and how Plaintiff learned of this alleged
 24 violation. Section 17533.7 states that a manufacturer may not label a product
 25 "Made in U.S.A." when the product or a part thereof has been entirely or
 26 substantially made, manufactured, or produced outside of the United States. Cal.
 27 Bus. & Prof. Code § 17533.7. Plaintiff does not plead how or when he learned that
 28 the cups he purchased allegedly did not meet these standards. Plaintiff also does

1 not plead what components were made outside the United States or where they
 2 were made. Plaintiff's knowledge of Playtex's alleged violation of the UCL and
 3 FAL is essential to a claim of injury or damage.

4 Moreover, Plaintiff does not plead that he would not have purchased the
 5 cups, or would have purchased different cups, had the alleged "correct" label been
 6 on the cups. At a minimum, Plaintiff is required to make this factual showing.
 7 Thus, Plaintiff does not plead any facts that show he lost money or property as a
 8 result of the "Made in U.S.A." label, and any inference of such an injury is
 9 improper. *See Western Mining Council v. Watt*, 643 F.2d 618, 624-26 (9th Cir.
 10 1981) (stating "the court need not accept as true unreasonable inferences,
 11 unwarranted deductions of fact, or conclusory legal allegations cast in the form of
 12 factual allegations.") Consequently, Plaintiff has no standing to assert claims under
 13 the UCL and FAL. Accordingly, this Motion to Dismiss should be granted.

14 **D. Plaintiff Fails to State a Claim Under the Consumer Legal Remedies**
 15 **Act.**

16 The CLRA targets a class of "unfair methods of competition and unfair or
 17 deceptive acts or practices" enumerated in Civil Code section 1770. Cal. Civ. Code
 18 § 1770(a). It allows a consumer who suffers damages as a result of such unfair or
 19 deceptive practices to bring an action either individually or on behalf of other
 20 consumers similarly situated. Cal. Civ. Code §§ 1780, 1781. The stated purpose of
 21 the Act is "to protect consumers against unfair and deceptive business practices and
 22 to provide efficient and economical procedures to secure such protection." *Hogya*
 23 *v. Superior Court*, 75 Cal. App. 3d 1221, 1235 (1977).

24 Relief under the CLRA is specifically limited to "[a]ny consumer who *suffers*
 25 *any damage* as a result of the use or employment of a proscribed method, act or
 26 practice" unlawful under the Act. Cal. Civ. Code § 1780(a) (emphasis added).
 27 Because relief under the CLRA is limited to those who suffer damage, causation is
 28 a necessary element of proof. *Wilens v. TD Waterhouse Group, Inc.*, 120

1 Cal.App.4th 746, 754 (2006). Further, California requires a plaintiff suing under
 2 the CLRA for misrepresentations in connection with a sale to plead and prove she
 3 relied on a *material* misrepresentation. *Cattie v. Wal-Mart Stores, Inc.*, 504 F.
 4 Supp. 2d 939, 946 (S.D. Cal. 2007), *citing Caro v. Proctor & Gamble Co.*,
 5 18 Cal.App.4th 644 (1993) (emphasis added).

6 In *Caro*, Plaintiff alleged defendants had misrepresented its product as
 7 “fresh” orange juice, when it was actually from concentrate. *Caro*, 18 Cal.App.4th
 8 644. The Court in *Caro* held that plaintiff cannot show reliance where the
 9 misrepresentation is not material. *Id.* at 668. “A misrepresentation of fact is
 10 material if it *induced* the plaintiff to *alter his position* to his detriment. Stated in
 11 terms of reliance, materiality means that without the misrepresentation, the plaintiff
 12 would not have acted as he did.” *Id.* (emphasis added). The Court concluded there
 13 was no material misrepresentation, and thus, no reliance because plaintiff did not
 14 believe the product to be “fresh” when he purchased it.

15 Similarly, Plaintiff did not plead any facts that show he allegedly relied on
 16 the “Made in U.S.A.” label. Plaintiff fails to plead any facts showing that the
 17 “Made in U.S.A.” label was a material misrepresentation or that he would have
 18 acted any differently in the absence of the “Made in U.S.A.” label. In fact, Plaintiff
 19 does not allege that he suffered *any damage*, or state *what damage* he suffered,
 20 anywhere in his Complaint. Plaintiff fails to plead when he purchased the Playtex
 21 spill-proof cups, where the “Made in U.S.A.” label appeared, and/or whether
 22 Plaintiff actually saw the label. In addition, Plaintiff fails to plead which of
 23 Playtex’s numerous cups he allegedly purchased or where they or their components
 24 were allegedly manufactured. Without clearly alleging how Playtex violated the
 25 CLRA and how Plaintiff learned of this, Plaintiff cannot allege that any alleged
 26 misrepresentation was material. Thus, Plaintiff fails to adequately plead reliance
 27 under CLRA. Accordingly, Plaintiff’s CLRA claim fails for lack of standing, and
 28 his Complaint should be dismissed.

E. Plaintiff Fails to Comply With the Notice Requirements of CLRA.

Under California Civil Code Section 1782, a plaintiff bringing a claim for damages under the CLRA must, thirty days or more prior to commencement of an action, notify the person alleged to have violated section 1770 of the “*particular* alleged violations” (emphasis added). Cal. Civ. Code 1782(a)(1). The notice must be in writing and must demand that such person “correct, repair, replace or otherwise rectify” the specific goods alleged to be in violation of section 1770. Cal. Civ. Code. § 1782(a)(2). Failure to provide adequate notice as required by section 1782 necessitates dismissal with prejudice. *Laster*, 407 F.Supp.2d 1181, 1196; *Von Grabe*, 312 F.Supp.2d 1285, 1304.

Plaintiff sent a letter to Playtex on July 24, 2007. *See*, Letter from Del Mar Law Group, attached as Exhibit A to Declaration of Ellen Darling ¶2. Plaintiff’s letter merely refers to Playtex’s alleged false representation that its spill-proof cups are “Made in U.S.A.” The letter names examples of Playtex spill-proof cups but fails to state *which* cups are allegedly in violation of the CLRA, or *which* cups Plaintiff purchased. The purpose of the notice requirement of section 1782 is to give the manufacturer sufficient notice of alleged defects to permit appropriate corrections or replacements. *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40 (Cal. Ct. App. 1975). In fact, the Court in *Outboard Marine* emphasized that the notice requirement of section 1782 is clear and unambiguous, and should be strictly construed. *Id.* at 40-41.

Playtex manufactures 14 different types of spill-proof cups. *See*, Liistro Decl. ¶2. Playtex could not be expected to repair, replace or rectify an alleged violation if the notification letter does not identify *which* product is at issue. Consequently, Plaintiff failed to comply with section 1782. Plaintiff’s CLRA claim should be dismissed with prejudice.

F. Plaintiff Fails to Comply With the Pleading Requirements of CLRA.

Under section 1780(c) of the California Civil Code, a plaintiff bringing an

1 action pursuant to section 1770, concurrently with the filing of the complaint, “shall
 2 file an affidavit stating facts showing that the action has been commenced in a
 3 county or judicial district described in this section as a proper place for the trial of
 4 the action.” If a plaintiff fails to comply with this section, the court shall, upon its
 5 own motion or upon motion of any party, dismiss any such action without
 6 prejudice. Cal. Civ. Code. § 1780(c).

7 Here, Plaintiff failed to attach, or thereafter provide, any affidavit as
 8 described in section 1780(c). Accordingly, Plaintiff’s CLRA claim must be
 9 dismissed.

10 V.

11 **CONCLUSION**

12 For the foregoing reasons, Playtex respectfully requests that this Court
 13 dismiss the Complaint in its entirety, with prejudice.

14
 15 Dated: November 13, 2007

SNELL & WILMER L.L.P.

16
 17
 18 By: /s//Samantha K. Feld

19 Ellen L. Darling
 20 Samantha K. Feld
 21 Attorneys for Defendant
 22 PLAYTEX PRODUCTS, INC.
 23 email: sfeld@swlaw.com
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CERTIFICATE OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626.

On Nov. 13, 2007 I served, in the manner indicated below, the foregoing document described as:

**DEFENDANT PLAYTEX PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT [FRCP 12(B)(6)];
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF BRENDA LIISTRO IN SUPPORT OF MOTION TO DISMISS;
DECLARATION OF ELLEN DARLING IN SUPPORT OF MOTION TO DISMISS**

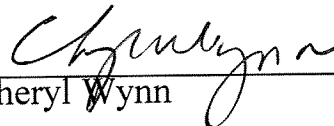
on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa addressed as follows:

PLAINTIFF COUNSEL	John H. Donboli, Esq. J.L. Sean Slattery, Esq. Del Mar Law Group, LLP 322 Eighth Street, Suite 101 Del Mar, California 92014 858.793.6244 858.793.6005, fax
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✓ BY E-FILING: I caused such document to be sent electronically to the court; pursuant to the Southern District of California Electronic Case Filing Administrative Policies and Procedures, Section 2.d., electronic filing constitutes service upon the parties.

✓ FEDERAL: I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made.

EXECUTED on Nov. 13, 2007, at Costa Mesa, California.


Cheryl Wynn